Consultation Plan: Polychlorinated Biphenyls (PCBs); Reassessment of Use Authorizations

Background Information on this Initiative

The Toxic Substances Control Act (the Act), enacted in 1976, provides EPA with authority to place restrictions on the production and use of chemical substances and/or mixtures. Section 6(e) of the Act (Attachment A) banned the manufacture, processing, distribution in commerce, and use of polychlorinated biphenyls (PCBs), except when such uses were "totally enclosed" or would otherwise pose no unreasonable risk of injury to health or the environment.

Congress's ban on PCBs and the implementing rules promulgated by EPA have done much to decrease the amount of PCBs in commerce; however, current allowable PCBs uses, along with the potential for their release into the environment, will continue so long as EPA's regulations allow it. The most effective method of reducing PCB use, distribution, and any consequential releases in the United States is to consider modifications to the regulations that allow their continued use by reassessing these authorizations to account for present-day economic conditions, technological advances, and the passage of years since the Agency originally promulgated them.

EPA has initiated this rulemaking to reassess the ongoing authorized uses of PCBs to determine whether certain use authorizations should be ended or phased out because EPA can no longer support the conclusion that they do not present unreasonable risk of injury to health and the environment. This rulemaking may address the following areas: (1) the use, distribution in commerce, marking and storage for reuse of liquid PCBs in electric and non-electric equipment (including use of PCB contaminated porous surfaces); (2) improvements to the existing use authorization for natural gas pipelines to provide more transparency for the Agency and the public when PCB releases occur; and (3) definitional and other regulatory clarifications and adjustments. EPA anticipates publishing a Notice of Proposed Rulemaking (NPRM) in the autumn of 2013.

1. Background of PCBs

PCBs belong to a broad family of man-made organic chemicals known as chlorinated hydrocarbons. PCBs vary in consistency from thin, light-colored liquids to yellow or black waxy solids. PCBs were widely used in industrial and commercial applications including electrical, heat transfer, and hydraulic equipment; as plasticizers in paints, plastics, and rubber products; in pigments, dyes, and carbonless copy paper; and many other industrial applications. PCBs were first domestically manufactured in 1929 and use continued with few restraints until the 1970s.

The toxicity associated with PCBs was recognized almost immediately due to a variety of industrial incidents. Harvard School of Public Health organized a conference about the hazards of PCBs in 1937, and a number of publications referring to the toxicity of various chlorinated hydrocarbons were published before 1940. PCBs are a persistent in the environment, bioaccumulate and biomagnify in food chains and are toxic to humans as well as wildlife.[1]

[1] *See, e.g.* Agency for Toxic Substances and Disease Registry (ATSDR). Toxicological Profile for Polychlorinated Biphenyls (PCBs) (November 2000). http://www.atsdr.cdc.gov/toxprofiles/tp17.html.

Concern over the persistence, bioaccumulation, and toxicity of PCBs in the environment led the United States Congress to ban their domestic production in the Toxic Substances Control Act (TSCA) (Attachment A), with certain exceptions and use authorizations.

2. The Regulations at 40 CFR 761 (Attachment B)

The authority for this action comes from sections 6(e)(2)(B) and (C) of TSCA (15 U.S.C. 2605(e)(2)(B) and (C)) as well as section 6(e)(1)(B) (15 U.S.C. 2605(e)(1)(B)). TSCA section 6(e)(2)(A) provides that "no person may manufacture, process, or distribute in commerce or use any polychlorinated biphenyl in a manner other than in a totally enclosed manner" after January 1, 1978. However, paragraph 6(e)(2)(B) provides EPA with the authority to issue regulations allowing the use and distribution in commerce of PCBs in a manner other than in a totally enclosed manner if the EPA Administrator finds that the use and distribution in commerce "will not present an unreasonable risk of injury to health or the environment." EPA's authority to allow distribution of PCBs in commerce under this provision is limited to those PCB items that were "sold for purposes other than resale" before April 1978 (TSCA section 6(e)(3)(C)) (15 U.S.C. 2605(e)(3)(C)).

On May 31, 1979, EPA promulgated regulations that implemented the 1978 PCB ban imposed by TSCA.[2] After the May 31, 1979, rule was published, the Environmental Defense Fund, Inc. (EDF) petitioned the U.S. Court of Appeals for the District of Columbia Circuit to review the portion of the 1979 regulation that designated the use of "intact and non-leaking" PCB liquid filled capacitors, electromagnets, and transformers (other than railroad transformers) as "totally enclosed." On October 30, 1980, the Court decided that there was insufficient evidence in the record to support the Agency's classification of the equipment as "totally enclosed."[3] The court vacated this portion of the rule and remanded it to EPA for further action. On August 25, 1982, EPA issued a new final rule (47 FR 37342) authorizing the use of PCBs in capacitors, electromagnets, and transformers (other than railroad transformers), in accordance with TSCA paragraph 6(e)(2)(B).[4] Time limits were imposed on the use of certain types of PCB equipment in locations where they would pose an exposure risk to food and feed. Since then, there have been additional rulemakings revising the use authorizations; however, with certain exceptions, the rules have continued to allow the use of PCB containing equipment to the end of the equipment's useful life, to allow the passive removal of PCB containing equipment from use through attrition, and to require the disposal of PCBs and PCB containing equipment in an environmentally-sound manner.

3. The Advance Notice of Proposed Rulemaking

On April 7, 2010 EPA published an Advanced Notice of Proposed Rulemaking (ANPRM) entitled "Polychlorinated Biphenyls (PCBs); Reassessment of Use Authorizations" (75 FR 17645) (Attachment C). The ANPRM explains that EPA believes that the balance of risks and benefits resulting from the continued use of remaining PCB containing equipment may have

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[2] U.S. EPA. Polychlorinated Biphenyls (PCBs) Manufacturing, Processing, Distribution in Commerce, and Use Prohibitions; Final Rule. **Federal Register** (44 FR 31514, May 31, 1979).

[3] *Environmental Defense Fund v. Environmental Protection Agency*, No.79-1580 (D.C. Cir. October 30, 1980).

[4] U.S. EPA. PCB Use in Electrical Equipment Final Rule. **Federal Register** (47 FR 37342, August 25, 1982).

changed enough to consider amending the regulations. As authorized PCB containing equipment ages, it becomes more prone to malfunctions, failure, and leaks. Technological advances in the industries that previously relied on PCBs have made replacement of PCBs with various alternatives economically feasible. Thus, continued use of PCBs in transformers and other electrical equipment no longer has the considerable level of economic benefits, which was assumed for the findings EPA made in the earlier rulemakings.

Potential Impact to Tribes

The EPA recognizes that decisions concerning the reassessment of the PCB use authorizations and other adjustments to the PCB regulations at 40 CFR 761 have consequences for tribal, state, and local governments, and for private parties. In particular tribes may be directly affected to the extent that they own, use, or dispose of PCB containing equipment including electrical equipment and florescent light ballasts. This equipment would be pre-1979.

In addition to general comments, EPA requests input on the following areas:

1. Do tribes have unique PCB-exposure concerns that EPA should be aware of in developing this action? EPA seeks input on any disproportionate environmental and public health impacts that PCB use and distribution in commerce for use may have on tribal populations. Examples may include increased exposure to contaminated fish than members of the general population, or increased exposure to PCB spills from abandoned or vandalized PCB containing electrical equipment than members of the general population.

2. To what extent are tribes direct owners or users of PCBs and PCB equipment? Do they own PCB transformers? If so, how old are they? Have there been instances of leaks or spills? If so, how much is spent cleaning of PCB accidents or spills?

3. Do the tribes have any information about the use of privately-owned PCB contaminated equipment on tribal lands? Have there been instances of leaks or spills?

5. EPA is concerned about the release of high concentrations of PCBs from fluorescent light ballasts, particularly in public buildings, such as schools. Do the tribes own or use buildings with PCB containing florescent light ballasts? Have they leaked? If so, how much has been spent remediating these spills?

6. Have the tribes experienced instances where PCBs have leaked from natural gas pipelines into gas meters, homes, or elsewhere?

Opportunity for Tribes to Participate

The tribal consultation process establishes a timeline for government-to-government consultation and coordination. Following the conclusion of the tribal consultation process, tribes may also participate in any public review and comment process.

Tribes may access related consultation information on the EPA Tribal Portal under Tribal Consultation Opportunities, located at: http://yosemite.epa.gov/oita/TConsultation.nsf/TC?OpenView.

More information on PCBs and EPA's regulations affecting their use is available at: http://www.epa.gov/epawaste/hazard/tsd/pcbs/index.htm.

Also, you may track the progress of this rulemaking on EPA's Rulemaking Gateway: http://yosemite.epa.gov/opei/RuleGate.nsf/byRIN/2070-AJ38.

The combined goal of all these efforts is to ensure there is sufficient information for tribal officials to make an informed decision about the desire to continue with consultation and to understand how to provide informed input.

Additional Information

Toxic Substances Control Act (TSCA) § 6(e); 15 USC § 2605(e), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=browse_usc&docid=Cite:+15USC2605.

40 CFR Part 761, Polychlorinated Biphenyls (PCBs) Manufacturing, Processing, Distribution in Commerce, and Use Prohibitions, *available at* http://www.access.gpo.gov/nara/cfr/waisidx_07/40cfr761_07.html.

US EPA, Advanced Notice of Proposed Rulemaking, Polychlorinated Biphenyls (PCBs); Reassessment of Use Authorizations, (75 FR 17645, April 7, 2010), *available at* http://www.gpo.gov/fdsys/pkg/FR-2010-04-07/pdf/2010-7751.pdf.